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Special Tactics for a Secret War

SPECIAL TACTICS FOR A SECRET WAR

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At an event entitled "Special Tactics for a Secret War," a distinguished panel of speakers focused on two questions: To what extent should our nation use the criminal justice model to deal with terrorists?; and to what extent should it rely on an alternative model? As to the first question, the speakers addressed the tension between the secrecy often required for an effective counterterrorism strategy and the openness valued in our criminal justice system. The speakers also discussed how the proposals for alternative models make it easier to protect important secrets but raise concerns about the legitimacy of the proceedings developed.

Bill McNair, former Chief Information Review Officer for the CIA Directorate of Operations opened the discussion with remarks on the appropriate criteria for classifying information and a broader discussion of the need to protect secrets. During his time at the CIA, Mr. McNair was responsible for determining the classification status of materials, including whether something could be made available for trial. Noting that his job was to protect information based on an assessment of the damage that its release might cause, he joked that among federal prosecutors he had earned the nickname of "Dr. No." Mr. McNair went on to remark that, while this may have been the perception of some prosecutors, people involved in intelligence operations appreciated and relied upon the maintenance of secrets.

"We release information that we know is going to do damage," stated McNair. For instance, in the Pan Am 103 case, based on the Lockerbie bombing, George Tenet insisted that the Agency would release documents, including to Scottish attorneys. In this case, the Scottish courts would not accept redacted versions of classified materials, even with ex-parte explanations of what was not disclosed publicly. The decision was made that cooperation and justice required an unprecedented level of sharing, and McNair noted that this undoubtedly had damaging consequences for the intelligence community. "This information is all hard to obtain," McNair said. "You don't get information from spies without considering what they have chanced.

You don't give it up unless you consider what they went through to give it to you."

Moving to the question of access to detainees, or information about them, Mr. McNair spoke briefly about the Zacarias Moussaoui case. During the pendency of his case, Moussaoui wanted to depose certain detainees in U.S. custody, but the CIA opposed the depositions. McNair remarked that the CIA's opposition was based on the structure of a terrorist cell, which requires each member to know only a limited number of other people involved. When one member of the cell goes missing, the others will have to take actions to discover whether the absent member has been captured, and such actions aid in an investigation. By keeping the identity of such a detainee secret, the CIA could cause more damage to the cell, permitting the agency to detect, identify, and respond to terrorist operations.

Mr. McNair regarded Moussaoui as a "time-bomb" for the criminal justice system, because of his decision to proceed *pro se*. In regards to Moussaoui's participation in his own trial, McNair declared, "He put the system against the wall." At first, Moussaoui would not talk to the attorneys assigned to his case. Later he requested classified information that he could not be provided because of the CIA's inability to control the serious damage that would result from its release. In reference to that damage, McNair added, "Most of the time, when you have a defendant who is trying to defend himself, you have an idea of what he knows. So you know that what you give him will add 'X' amount to what he knows. With Moussaoui, we didn't know the body of knowledge that he had, so we could be giving him the keys to the kingdom."

Mr. McNair then expressed the lesson he learned from this experience: "If I were Osama bin Laden, what I would do is direct a couple of 'throwaways', and tell them, 'I want you to get captured. Then I want you to insist on self-defense, I want you to ask for all the information you can possibly imagine.' If they do that, the system will be shattered." Mr. McNair then said that he was not optimistic about finding a solution to such a tactic within the criminal justice system. For McNair, such a scenario would not present the same opportunities as did the Lockerbie bombing for the intelligence community to make accommodations to a criminal justice model and accept the damage the release of information would cause.

Professor John Norton Moore, the founder and director of the Center for National Security Law at the University of Virginia, built on Mr. McNair's focus on the practical manifestation of tension between secrecy and disclosure in terrorism cases. His remarks addressed four

central themes that explored not only legal issues, but also problems of policy and politics.

First, Professor Moore noted that terrorism is not simply a problem for one agency, or exclusively for the criminal justice system. "You can't choose between the criminal justice system and the military use of force—indeed it isn't just those two . . . there is also the civil litigation system, and civil justice."

Second, Moore stressed that compliance with the laws of war is important in a democracy. He argued that by involving the military in counterterrorism strategy, we rightfully make terrorists lawful targets. As it would be in regular war-fighting, this requires application of the "laws of war." This strategy would permit a country to prevail not only militarily, but also politically. By contrast, Professor Moore stated that in Vietnam, the military might have won the armed conflict, but the political battle was lost. On that note he added the following: "If we fail to comply with the laws of war, we will lose our public. We will lose our network of allies around the world. Almost nothing is as effective in causing a war to be lost as failing to follow the fundamental agreed-upon principles in the law of war."

A specific example of this would be the Mi Lai massacre. According to Professor Moore, the Vietnam War was just, but the massacre at Mi Lai was the equivalent of adding two divisions to the other side. Another example he highlighted was the failure to train the Contras in Nicaragua in the laws of war, thus undermining support. Professor Moore also expressed concern that the abuses at Abu Ghraib may well have repeated these failures. After Vietnam, the military has led the world in training for the laws of war. Operational lawyers were deployed in the field in the first Gulf War, and no human rights violations occurred. Any approach to terror suspects has to be cognizant of the political aspect, and the effect this element has on both domestic and foreign democratic will.

In line with this understanding, Professor Moore's third theme reflected a democracy's response to violations of the laws of war, whether real or perceived. While Moore considers democracies to be the finest form of government, he noted that "eternal vigilance is the price of liberty," and even great nations may engage in conduct in war that causes concerned citizens to feel that mistakes were made. Examples of past political/legal reactive mistakes include the Alien and Sedition laws of the 1780s and the Sedition Act of 1918, which permitted prosecutions of those critical of the government. Another example would be the internment of the Japanese that began in 1942, and the withholding of

information from the Court that the people being held were not actually a threat. However, Professor Moore considers the creation of the "wall" between the FBI and the CIA in the 1970s to be an error in the opposite direction. He also expressed the opinion that the USA PATRIOT Act is "overwhelmingly not a problem," noting that a roving wiretap, for instance, is an eminently sensible tool in counterterrorism.

While Professor Moore did not express ideological opposition to bending the traditional framework of an accused's rights, he is concerned about the path that has been taken in recent years. He applied this specifically to U.S. treatment of detainees. According to Moore, the "dumbing down of the statutes on torture," mistakenly overrode military advice, which reflected a deeper understanding of the political situation, and opened the floodgates of criticism. On this mistake, Moore declared, "It is literally a recruiting poster for al Qaeda."

Lastly, Professor Moore explained that there remain issues in handling detainees other than abuse. Some of these remaining questions dealt with limits on interrogation practices, the condition of detention facilities, the permissible duration a person may be held, and the access to legal counsel.

Professor Moore went on to declare that for prisoners of war (POW), the Geneva Conventions are generally "right on, not at all outmoded and terribly important." He expressed concern that a shift to a pure application of the criminal justice system for those without POW status, would have severe problems, much as Mr. McNair described. Professor Moore mentioned a third option—a special set of national security courts, but he did not see this as possible in our democratic system, because such courts have not worked well where tried in the past.

He then suggested two final models to be explored: first, he suggested a set of commissions with the same rules the military applies under the Uniform Code of Military Justice or a congressionally established set of military commissions; second he suggested a criminal justice model with congressionally created substantive and procedural adjustments to the current system—possibly setting aside some conventions such as the hearsay rule.

Professor Neal Katyal of University of Georgetown Law School and lead civilian counsel for Salim Hamdan before the U.S. Supreme Court followed Professor Moore's comments by asserting that he does not believe that anyone takes seriously the use of the civilian justice system as a method for trying terrorists. For Professor Katyal the only remaining question to consider was, "Which military model are we going

to adopt?"

Mr. Katyal argued that the judiciary ought to play a limited role in overturning acts of the coordinate branches, and that the President should have broad war-fighting and classification powers. With that general viewpoint, when looking at military commissions in which the executive branch established a separate system with rules of its own making, and unilaterally limited judicial oversight of that system, Mr. Katyal believed that the government had gone too far.

He went on to describe how the National Defense Strategy "equat[ed] terrorism and the use of the judicial processes." This conflation, Mr. Katyal described, argued that the use of those processes was part of a strategy employed by terrorists and was being used to discredit lawyers attempting to represent Guantanamo detainees. The response to the potential that terrorists may try to put the criminal justice system in turmoil had led to what Mr. Katyal termed "the unrooted Presidency"—a phenomenon that placed the President above the Constitution, the laws, and the treaties of the United States. Quoting from the Declaration of Independence, Professor Katyal compared the actions of the Bush Administration to those of King George III.

However, Professor Katyal noted that his concerns were not so great when considering whether the President had the ability to detain terrorism suspects. "Congress has already said that the President can use force against al Qaeda and terrorists, so for me, if the President is authorized to shoot a terrorist, he is authorized to detain him." He recognized that detention might pose a policy concern, but he did not believe there was any constitutional "get-out-of-jail-free card" for those held at Guantanamo. The ability to detain such suspects without the need to try them would make it possible to avoid the Moussaoui problem. If the government wanted to try terrorism suspects, Professor Katyal mentioned two alternatives: first, the use of courts martial; or second, the military commissions that the executive branch had established. Because courts martial have been congressionally authorized since 1916, Professor Katyal believed that system was capable of handling cases against those held at Guantanamo.

In addition to constitutional problems posed by the military commissions as established, Professor Katyal argued that that system violated the Geneva Conventions. To illustrate his point, he suggested, as an example, the story of American pilots shot down during World War II over Japan. The Japanese military designated these captives as enemy combatants, declared that Geneva did not apply, and executed them. After the war, American courts martial declared this a violation of the

laws of war.

Professor Katyal closed his remarks by arguing that the presidentially established military commissions were not only improper, but that they had also been unsuccessful. He finished by calling on Congress to establish a system which could meet constitutional requirements, and which could effectively be used.

All three panelists expressed the similar concern that the U.S. had not yet found the best practice for balancing the application of law and the practical necessities of fighting a war in the context of trying terror suspects. Their remarks clarified the practical difficulties for those in the intelligence community posed by using the criminal justice model to try terrorism suspects. In order to maintain legitimacy, there seemed to be consensus among the panel that a solution should involve all three branches of government, and take into account its foreign and domestic political ramifications.